DISTRICT COURT, COUNTY OF BOULDER STATE OF COLORADO Court Address: 1777 6TH St Boulder CO 80302 303-441-3750	DATE FILED: March 21, 2014 11:21 AM FILING ID: 38D5525FE7381 CASE NUMBER: 2013CV63
COLORADO OIL & GAS ASSOCIATION, COLORADO OIL AND GAS CONSERVATION COMMISSION, TOP OPERATING COMPANY Plaintiffs, v. CITY OF LONGMONT, COLORADO Defendant Defendants-Intervenors: OUR FUTURE, OUR LONGMONT; SIERRA CLUB; FOOD AND WATER WATCH; EARTHWORKS	▲ **COURT USE ONLY** ▲
Plaintiff TOP Operating Attorney: Thomas J. Kimmell, Reg. No. 9043 Zarlengo & Kimmell, PC 1775 Sherman Street, Suite 1375 Denver, CO 80203 Telephone 303 832 6204 Fax 303 832 6401 Email Kimmell01@aol.com	Case No.: 2013CV63 Courtroom: 3
TOP OPERATING COMPANY'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM BRIEF	

Plaintiff-Intervenor TOP Operating Company ("TOP") hereby files this Motion for Summary Judgment and Supporting Memorandum Brief. As set forth in more detail below, no genuine issues of material fact exist, the ban on hydraulic fracturing passed by Longmont directly conflicts with state regulation of this technical aspect of oil and gas operation, and as a matter of firmly established Colorado case law, Longmont's ban should be declared invalid as preempted by state law.

STATEMENT OF THE CASE

On November 6, 2012, the voters of Longmont passed Resolution R-2012-67, which contains an absolute ban on any hydraulic fracturing operations within Longmont and on the storage or disposal of wastes created in connection with the hydraulic fracturing process within Longmont. Since passage of this Resolution, Longmont has required as a condition of approval for any oil and gas well drilled in Longmont a ban on the use of any hydraulic fracturing ('fracking") techniques. See Longmont permit issued to TOP attached hereto as Exhibit A.

On December 12, 2012, the Colorado Oil and Gas Association ("COGA") commenced the present action seeking, among other things, a declaration that Longmont's fracking ban was invalid and preempted by state law. TOP Operating Company was subsequently granted permission to intervene and on June 28, 2013, its Complaint was deemed served and filed. TOP has asserted a single claim for declaratory judgment and injunction, seeking a declaratory judgment that Resolution R-2012-67 is invalid and preempted by state law and an injunction enjoining the City from any further enforcement of this Resolution.

STATEMENT OF THE FACTS

1. TOP Operating Co. ("TOP") is a Colorado corporation qualified to do business in the State of Colorado. TOP conducts business in the oil and gas industry and owns oil and gas interests and operates oil and gas wells in Colorado. The principal holdings of TOP are located within or adjoining to the City of Longmont. TOP has the exclusive leasehold right to develop numerous oil and gas reserves and TOP is the primary oil and gas operator within Longmont.

See Affidavit of Murray Herring attached hereto as Exhibit B. These oil and gas reserves are part of the Wattenberg field, which is now known as a particularly low risk and profitable oil and gas area.

2. For the last twenty to thirty years, all wells drilled by TOP and virtually, if not all, of wells drilled by other operators in the Wattenberg field have been completed with hydraulic fracturing and hydraulic fracking is a standard and essential industry practice. See Affidavit of Murray Herring, Exhibit B attached hereto. As found in the rule making conducted by the Colorado Oil and Gas Conservation Commission in 2011 and set forth in the "Proposed Statement of Basis, Specific Statutory Authority, and Purpose" for the hydraulic fracturing rules adopted by the Colorado Oil and Gas Commission on December 13, 2011, "Most of the hydrocarbon bearing formations in Colorado would not produce economic quantities of hydrocarbons without hydraulic fracturing." See Report of Commission, attached hereto as Exhibit C and Proposed Statement of Basis, Specific Statutory Authority, and Purpose, Paragraph 9.

3. The real property in which TOP's oil and gas reserves are located and that is affected by and is the subject of this action is located in both Weld County and Boulder County and is more described as follows:

Township 3 North, Range 68 West
Sections 30, 31, and 32

Township 2 North, Range 68 West
Sections 5, 6, 7, 8, 17, and 18

Township 3 North, Range 69 West
Section 36
(referred to as "Subject Property")

4. TOP owns various oil and gas leases covering the Subject Property. Under such leases, TOP has the sole and exclusive right to drill oil and gas wells on the lands covered by such leases. Prior to the approval of the fracking ban in November 2012, Longmont recognized TOP as the primary Operator within Longmont and expressly agreed to TOP's development of the City's mineral interests and to numerous contractual and property rights in TOP's favor. See Exhibit B, Paragraph 2. By Master Contract dated August 8, 2012 and Operator's Agreement dated July 17, 2012 (attached hereto as Exhibit D), TOP and Longmont entered into agreements relating to TOP's oil and gas operations within Longmont. Pursuant to these agreements, Longmont ratified the validity of previous oil and gas leases previously taken by TOP in which Longmont now own a royalty interest, such as the Peschell and Collins leases; executed three new oil and gas leases to TOP covering minerals owned by Longmont described as the Lower Adrian, Koester, and Northern Shores properties; and expressly gave TOP the right to use eleven different drill sites and two tank battery locations to drill and produce oil and gas wells and to conduct oil and gas operations, specifically including fracking and re-fracking operations. Exhibit D.

5. TOP wishes to fully exercise its exclusive rights under its Oil and Gas Leases to develop and produce its oil and gas reserves from surface or into bottom hole locations within the City. See Affidavit attached hereto as Exhibit B, Paragraph 5. In accordance with standard industry practice in the Wattenberg Field, TOP plans to utilize hydraulic fracturing as to the targeted formation(s) in all wells. TOP will not and cannot economically drill and complete these wells without the ability to conduct hydraulic fracturing operations, which it is currently

unable to do in view of Longmont's fracking ban. *Id*. To the knowledge of TOP's geologist, every economic well in the Wattenberg Filed drilled in the last twenty years has been hydraulically fractured. See Exhibit B, Paragraph 5.

I. LONGMONT'S FRACKING BAN DIRECTLY CONFLICTS WITH STATE REGULATION OF THIS TECHNICAL ASPECT OF OIL AND GAS OPERATIONS AND IS INVALID AND PREEMPTED AS A MATTER OF LAW

The law of preemption as to municipal or county regulation of oil and gas operations is well established in Colorado. Since 1992, when the Colorado Supreme Court invalidated Greeley's municipal ban on oil and gas drilling on the grounds of preemption in *Voss v. Lundvall Brothers, Inc.*, 830 P. 2d 1061 (Colo. 1992), and continuing through the present time, the Colorado Supreme Court and Colorado Court of Appeals have issued a host of decisions in this area. These decisions have consistently upheld and applied the same policies, principles and standards for preemption.

A. COLORADO HAS A SUBSTANTIAL STATE INTEREST IN UNIFORM REGULATION OF OIL AND GAS OPERATIONS

Since 1915, oil and gas development has traditionally been and continues to be treated as a matter of state concern and control. Both the legislature and the Courts have recognized that the state has a substantial interest in regulation of oil and gas operation. In particular, Colorado law has recognized the State's strong interest in the uniform, efficient and fair development of oil and gas resources and, regardless of where located, in protecting the coequal and correlative rights of mineral owners and producers throughout the state to a fair share of the production profits. *See Voss v. Lundvall Brothers, Inc.*, 830 P. 2d 1061 (Colo. 1992) and *Bd. of County Commissioners v. Bowen/Edwards*

Associates, Inc., 830 P. 2d 1045 (Colo. 1992); Oil and Gas Conservation Act, C.R.S. Section 34-60-101 et. seq.

Colorado has empowered the Colorado Oil and Gas Conservation Commission as the agency with the expertise, manpower, and authority to regulate oil and gas development throughout the state. Since passage of the Oil and Gas Conservation Act in 1951 and continuing with amendments throughout 2013, the Colorado Legislature has expressly provided for the Commission's authority to regulate "drilling, producing … and all other operations for the production of oil or gas", "[t]he shooting and chemical treatment of wells", and "[o]il and gas operations so as to prevent and mitigate adverse environment impacts". C.R.S. Section 34-60-106(2) (a), (2) (b), (2) (d). As set forth in more detail below, in accordance with this statutory authority, the Commission has enacted comprehensive rules and regulations governing oil and gas operations, expressly including and permitting hydraulic fracturing operations.

B. THE COLORADO OIL AND GAS CONSERVATION COMMISSION EXPRESSLY PERMITS AND REGULATES HYDRAULIC FRACTURING

The Commission has enacted detailed regulations governing hydraulic fracturing and the technical aspects of down hole oil and gas operations. By Report of the Commission dated December 13, 2011, the Commission concluded its rule making process and adopted new rules and amendments to Rules 100, 205, 305, 316, and 523 to more specifically regulate hydraulic fracturing operations. See Exhibit D attached hereto. Rule 205A of the Commission's Rules and Regulations requires an Operator to disclose, maintain and make

available a chemical inventory of products used in hydraulic fracturing treatments. Rule 207 empowers the Commission to require tests or surveys to determine the occurrence of water pollution, such as Braidenhead monitoring of the annulus between the production tubing and casing. Rule 305(c) (1) (iii) requires the Oil and Gas Location Assessment Notice to include information as to fracking operations. Rule 305.E. (1) now requires that the Operator provide notice to landowners of the details of hydraulic fracturing treatments.

Rule 316C requires the Operator to provide to the Commission advance written notice of any hydraulic fracturing treatments and to complete a specified Form 42 as to such treatments, a copy of which is also provided to the local governmental designee. Operators are also required to file a Completed Interval Report, Form 5A, which must contain the details of any hydraulic fracturing treatment.

The Commission has also promulgated detailed regulations to protect the environment from all down hole oil and gas operations, such as fracking. Rule 317 of the Commission's Rules and Regulations requires Operators to install casing that satisfies specified quality and quantity requirements and to follow specified cementing procedures in order to protect and isolate groundwater formations. Rule 318A.4 requires groundwater monitoring to determine and prevent contamination. The Commission also directly regulates disposal of fluids, including fluids used for hydraulic fracturing (see Rule 325), preparation, interim reclamation and final reclamation of drill sites (see Rules 1002, 1002, 1003), imposes financial assurance requirements on Operators, including for

protection of surface owners (see Rule 703), requires notices to and consultation with surface owners and local government representatives (Rule 316), regulates odors and dust from oil and gas operations, including as to sand used in fracking operations (Rule 805), contains noise abatement requirements (Rule 802), visual impact rules (Rule 804), protects soil (Rule 706), regulates disposal of waste and fluids (Rules 907 and 908), requires mitigation measures in certain circumstances, such as requiring closed loop systems as to fluids used in oil and gas operation (Rule 604) and creates procedures for inspection and enforcement of Commission's rules. In summary, the Commission expressly permits Operators to utilize hydraulic fracturing procedures on all wells in Colorado and directly regulates these and related procedures through detailed and comprehensive rules and regulations.

C. THE CITY OF LONGMONT HAS BANNED ANY HYDRAULIC FRACTURING OPERATIONS AND STORAGE AND DISPOSAL OF RELATED WASTES FROM ANY LOCATION WITHIN LONGMONT.

In November 2012, Longmont passed Resolution R-2012-67, Article XVI of the Longmont Municipal Code. This Resolution contains an absolute and permanent ban on any hydraulic fracturing operations within Longmont and on the storage or disposal of wastes created in connection with the hydraulic fracturing process within Longmont. Since passage of this Resolution, Longmont has required as a condition of approval for any oil and gas well drilled in Longmont compliance with the Article XVI ban on the use of any hydraulic fracturing ('fracking") techniques. See Exhibit A, Paragraph 2. Accordingly, Longmont unequivocally prohibits oil and gas owners from conduct fracking

operations under all circumstances as to property located within Longmont, while the State of Colorado unequivocally allows fracking subject to compliance with regulatory requirements. In view of the direct conflict between the Commission's allowance of fracking and Longmont's ban on fracking, this Brief now turns to the law of preemption in order for this Court to determine the priority to be given to the conflicting laws enacted by these different levels of government.

D. THE POLICY BEHIND THE PREMPTION DOCTRINE AND PREEMPTION STANDARDS

The policy behind the preemption doctrine in Colorado "is to establish a priority among potentially conflicting laws enacted by various levels of government." *Town of Carbondale v. GSS Properties, LLC,* 140 P. 3d 53, 59-60 (Colo. App. 2005); *Bd. of County Commissioners v. Bowen/ Edwards Associates, Inc*. , 830 P. 2d 1045, 1057 (Colo. 1992). Given the clear conflict between Longmont and State of Colorado laws as to fracking operations, this case is a prime example of a conflict to be resolved under the law of preemption.

As articulated by the Colorado Supreme Court in *Bd. of County Commissioners v. Bowen/ Edwards Associates, Inc*, 830 P. 2d 1045, 1057 (Colo. 1992), state preemption over local regulation applies generally in three circumstances: (1) the state statute expressly preempts all local authority over the issue; (2) the implied intent behind the state statute is to completely occupy the given field; or (3) the local or municipal regulation conflicts with application of the state law or state regulatory scheme. As to oil and gas development, the Courts have recognized that local land use regulations that incidentally affect oil and gas development, like traffic control, are not automatically preempted and

may be matters of mixed concern. However, where a local government entity attempts to directly regulate a particular mining technique, as in *Colorado Mining Association v. Board of County Commissioners of Summit County*, 199 P. 3d 718, 730 (Colo. 2009), the Courts have found that this entire field is impliedly preempted and have invalidated local regulations on this basis. Other than this implied preemption situation, most of the preemption cases revolve around application of the third test, namely that of operational conflict between local and state regulation.

Since the Colorado Supreme Court's rulings in 1992, this operational conflict test has been recognized and applied in a host of decisions involving challenges to local regulation of oil and gas and other operations, including the cases of *Town of Frederick v. North American Resources Company*, 60 P. 3d 758, 761 (Colo. App. 2002); *Board of County Commissioners of Gunnison County v. BDS International, LLC*, 159 P. 3d 773. 778 (Colo. App. 2006); *Colorado Mining Association v. Board of County Commissioners of Summit County*, 199 P. 3d 718, 730 (Colo. 2009); *Town of Milliken v. Kerr-McGee Oil & Gas Onshore, LP*, 2013 COA 72, 12 CA 1618 (Colo. App. 2013); *Town of Carbondale v. GSS Properties, LLC,* 140 P. 3d 53, 60 (Colo. App. 2005); *Town of Telluride, CO v. Lot Thirty-Four Venture, L.L.C.,* 3 P.3d 30 (Colo. 2000); *Webb v. City of Black Hawk*, 295 P.3d 480, 2013 CO 9 (Colo. 2013); and *JAM Restaurant, Inc. v. City of Longmont*, 140 P.3d 192 (Colo. App. Div. 2 2006).

The above cases have uniformly held that the operational conflict test requires a declaration of preemption where local regulations materially impede the state interest, cannot be harmonized with state statute or regulation, or

contain conditions which are inconsistent or irreconcilable with the state regulatory scheme. For example, as stated in *Bowen/Edwards,* 830 P. 2d at 1059, “State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest.” As stated in *Voss v. Lundvall Bros.*, 830 P. 2d 1061, 1069 (Colo. 1992), “We conclude that the state’s interest in efficient oil and gas development and production throughout the state, as manifested in the Oil and Gas Conservation Act, is sufficiently dominant to override a home-rule city’s imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city limits”. In Board *of County Commissioners of Gunnison County v. BDS International, LLC*, 159 P. 3d 773. 779 (Colo. App. 2006), the Colorado Court of Appeals applied the operational conflict test, as follows: “Where no possible construction of the County Regulations may be harmonized with the state regulatory scheme, we must conclude that a particular regulation is invalid.” In *Colorado Mining Association v. Board of County Commissioners of Summit County*, 199 P. 3d 718, 725 (Colo. 2009), the Colorado Supreme Court observed that “Mere overlap in subject matter is not sufficient to void a local ordinance. However, a local regulation and a state regulatory statute impermissibly conflict if they”contain either express or implied conditions which are inconsistent or irreconcilable with each other.” Further in *Bowen Edwards*, at 1060, the Colorado Supreme Court ruled that county regulations cannot impose technical conditions on oil and gas wells which are not required by or are contrary to state regulations, stating as follows:

> [T]he operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation. To the extent that such operational conflicts might exist, the county regulations must yield to the state interest.

E. THE COURTS HAVE REPEATEDLY HELD THAT LOCAL REGULATION OF TECHNICAL ASPECTS OF OIL AND GAS OPERATIONS AND LOCAL REGULATIONS THAT CONFLICT WITH STATE LAW ARE PREEMPTED AND INVALID

The standard to evaluate preemption challenges to legislation passed by home rule cities (like Longmont or like Greeley in *Voss v. Lundvall Bros.*) is well established. The Courts have first analyzed whether the matter is one of statewide, mixed, or local concern. If the local ordinance is a matter of purely local concern, then the ordinance supersedes state law. If, however, the ordinance affects a matter of statewide or mixed concern, then the state rule supersedes and preempts the local ordinance if there is any conflict between the different rules or if the state Constitution or state law does not provide specific authorization to the locality to legislate in this area. *City of Northglenn v. Ibarra*, 62 P. 3d 151, 155, 163 (Colo. 2003); Webb *v. City of Blackhawk*, 295 P. 3d 496 (Colo. 2013); Voss *v. Lundvall Bros*, 830 P.2d at 1067.

The above determination is usually made by the Court on summary judgment without an evidentiary hearing, as in *Voss v. Lundvall Bros, Town of Frederick, and Gunnison Count v. BDS.* The four factors that the Court looks to determine the nature of the matter are (1) the need for statewide uniformity; (2) the extraterritorial impact of the local law; (3) whether the matter has traditionally

been governed locally or by the state and (4) whether the Colorado Constitution or other state law commits the matter to state or local regulation. *Id*.

Applying all four factors to the present case compels the conclusion that regulation of hydraulic fracturing is a matter of statewide concern and is not purely a local issue. As found by the Colorado Courts as to oil and gas regulation, factors (1) and (3) strongly support the state interest in this matter. As discussed above in Section A of this Motion, the Colorado Courts have unequivocally and repeatedly held that there is a strong need for and policy in favor of statewide uniformity as to regulation of oil and gas development and that the "regulation of oil and gas development and production has traditionally been a matter of state rather than local control". Voss, 830 P.2d at 1068. Factors (2) and (4) above also lead to a determination that oil and gas regulation is a matter of statewide concern. In Voss v. Lundvall Bros, 830 P. 2d at 1068, the Colorado Supreme Court found that Greeley's drilling ban had extraterritorial effect, stating as follows:

> Limiting production to only one portion of a pool outside the city limits can result in an increased production cost, with the result that the total drilling operation may be economically unfeasible. Greeley's total drilling ban thus affects the ability of nonresident owners of oil and gas interests in pools that underlie both the city and land outside the city to obtain an equitable share of production profits in contravention of one of the statutory purposes of the Oil and Gas Conservation Act.

As to factor (4), neither the Colorado Constitution nor other state law contains any provisions giving localities authority to regulate oil and gas operations.

Based on the above standards and the implied preemption and operational conflict tests, the Colorado Courts have repeatedly invalidated local regulations

on oil and gas operation, which regulations are remarkably similar to and, indeed, less intrusive than the Longmont fracking ban in the present case. In *Voss v. Lundvall Bros., supra*, the Colorado Supreme Court found that Greeley's ban on drilling within municipal borders was preempted. Given the universal use of fracking on all oil and gas wells in the Wattenberg Field, under this precedent, Longmont's prohibition of any fracking in the Longmont part of the Wattenberg Field also acts as a de facto drilling ban and is similarly preempted. TOP submits that Voss v. Lundval Bros. is sufficient precedent in and of itself to invalidate Longmont's fracking ban.

However, the cases decided after the 1992 decision in *Voss v. Lundvall Bros., supra,* independently compel and support a finding of preemption. In *Town of Frederick v. North American Resources Company*, 60 P. 3d 758 (Colo. App. 2002), the Court of Appeals ruled that "certain provisions of the Town's ordinance do regulate technical aspects of drilling and related activities and thus could not be enforced. Id at 764. In particular, the Court held that Frederick's ordinance provisions imposing set back requirements for the location of wells, regulating noise abatement, and regulating the visual impact of oil and gas operations conflicted with detailed requirements of the Commission rules and were invalid on the grounds of operational conflict. Id. at 765. Longmont's fracking ban similarly conflicts with the policies, requirements, and regulation of fracking followed by the Commission, as discussed in detail in section B of this Brief.

In *Board of County Commissioners of Gunnison County v. BDS International, LLC*, 159 P. 3d 773. 778 (Colo. App. 2006), the Court of Appeals held that Gunnison County's regulations concerning fines, financial guarantees,

and access to records were invalid "because they operationally conflict with state statutes or regulations." The same type of operational conflict exists in the present case as to Longmont's fracking prohibition.

In *Town of Milliken v. Kerr-McGee Oil & Gas Onshore, LP*, 2013 COA 72, 12 CA 1618 (Colo. App. 2013), the Court held that the Town of Milliken was preempted from imposing fees for site safety and security inspections on oil and gas wells conducted by the Town's police department. The Court rejected Milliken's argument that its inspections of oil and gas wells were different from and therefore not in conflict with the Commission's inspections. The Court held that regardless of whether the Commission's inspections were the same as the Town's inspections, "The relevant inquiry is whether the Town's inspections concern 'matters that are subject to rule, regulation, order or permit condition administered by the commission.' Section 34-60-106(15)." This holding applies with equal force to the present case, since the technical aspects of oil and gas operations, like fracking, are directly delegated to and regulated by the Commission.

In Town of Telluride, CO v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30 (Colo. 2000), the Colorado Supreme Court declared a Telluride ordinance providing for rent control on private residential properties preempted by a state statute that prohibited local municipalities from controlling rents, stating as follows:

> After determining that this is an issue of mixed local and state concern, the next step in the analysis is to ask whether the home rule ordinance conflicts with the state legislation. See National Adver. Co., 751 P.2d at 638. Since we find Ordinance 1011 to be a form of rent control, the ordinance clearly conflicts with the

> state statute. See supra, Part II. Because the two measures conflict, the local ordinance must yield to the state statute.

In *Webb v. City of Black Hawk*, 295 P.3d 480, 2013 CO 9 (Colo. 2013), the Colorado Supreme Court considered the validity of a ban by the City of Black Hawk of bicycles upon city streets. The Court determined that Black Hawk's ban was invalid as preempted by state law providing that local governments can ban bicycle traffic only where a suitable and adjacent bike path is established, stating as follows:

> In light of our conclusion that the regulation of bicycle traffic on municipal streets is of mixed state and local concern, we next look to determine whether Black Hawk's ordinance conflicts with state law. The test to determine whether a conflict exists is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes.

The Court in Webb reaffirmed the state's interest in regulatory uniformity, in avoiding extraterritorial effects on state residents outside the municipality, and in preventing a municipality from forbidding any activity that is expressly permitted by state regulation.

In *Colorado Mining Association v. Board of County Commissioners of Summit County*, 199 P. 3d 718, 730 (Colo. 2009), a case also on all fours, the Colorado Supreme Court considered the validity of a Summit County ordinance that banned the use of toxic or acidic chemicals, such as cyanide, for mineral processing in mining operations. As noted by the Colorado Supreme Court, the "effect of this ordinance is to prohibit a certain type of mining technique customarily used in the mineral industry to extract precious metals, such as gold." *Id* at 721. The Court struck down the Summit County ordinance on the grounds of preemption, stating as follows:

> The General Assembly assigned to the Board [the Mined Land Reclamation Board] the authority to authorize and comprehensively regulate the use of toxic or acidic chemicals, such as cyanide, for mineral processing in mining operations that Summit County's existing ordinance would occupy, negating the Board's statutory role. We conclude that Summit County's existing ordinance is not a proper exercise of its land use authority because it excludes what the General Assembly has authorized. Due to the sufficiently dominant state interest in the use of chemicals for mineral processing, we hold that the MLRA impliedly preempts Summit County's ban on the use of toxic or acidic chemicals, such as cyanide, in all Summit County zoning districts. Id. at 723.

This holding is directly applicable to the present case. To the same extent that Summit County's ban on the use of certain mining chemicals is preempted because of the state's grant of exclusive authority to the state mining agency to regulate the use of chemicals for mining, Longmont's ban on fracking is similarly invalid because the field of regulation of technical aspects of oil and gas operations is given and reserved to the Colorado Oil and Gas Conservation Commission. Further, like Summit County's ban, Longmont's Resolution affects an otherwise allowable operation and technical aspect of oil and gas operations, which conflicts with the Colorado Oil and Gas Commission's delegated and exercised authority to regulate this technical aspect of oil and gas drilling.

In *JAM Restaurant, Inc. v. City of Longmont*, 140 P.3d 192 (Colo.App. Div. 2 2006), the Colorado Court of Appeals examined the constitutionality of a Longmont ordinance which limited the locations of "sexually oriented businesses" to industrially zoned areas. In response to a challenge by the owner of a cabaret featuring nude dancing which was not located in an industrial zone, the Court struck down this part of the City's zoning statute. In particular, the Court held that the Longmont ordinance was preempted by the state law prohibiting the

taking of private property without just compensation. The Court reasoned as follows:

> We also must determine whether the Colorado Constitution specifically commits zoning to state or local regulation. We conclude the issue here is not exclusively committed to local regulation. As previously noted, § 38-1-101 (3) (a) is not a zoning regulation. It was enacted to protect inalienable property rights recognized by the Colorado Constitution. Because inalienable property rights are involved, both local and state concerns are implicated, and the constitution "cannot be read to dictate the matter at issue as one of exclusively local concern." City of Northglenn v. Ibarra, supra, 62 P.3d at 162 (quoting City of Commerce City v. State, supra, 40 P.3d at 1283-84).
>
> Although zoning regulations generally have little extraterritorial impact and are traditionally a matter of local concern, in consideration of the legislative declaration respecting § 38-1-10(3)(a) and the importance of protecting constitutionally based property rights, we conclude preventing the taking of private property without just compensation is a matter of statewide or, at the least, mixed concern. 140 P.3d 197. We therefore conclude § 38-1-101(3) (a) is constitutional, does not violate the home rule amendment to the Colorado Constitution, and prevails over Longmont's zoning ordinance as applied to JAM.

This ruling, which has not been disturbed or questioned by the Colorado Supreme Court, presents additional support for a determination that Longmont's fracking ban, is preempted and unconstitutional. Not only is the fracking ban preempted by conflict with state regulation of this technical aspect of oil and gas operation, but, in addition, the ban is preempted by state law requiring just compensation for the taking of private property. Undisputedly, the oil and gas reserves owned by TOP within Longmont's boundaries are extremely valuable using customary drilling and completion practices, including fracking, are private property and are rendered essentially worthless and thus deemed "taken" by Longmont's fracking prohibition.

II. SUMMARY

In summary, the City of Longmont's absolute and permanent ban on fracking operations within Longmont is preempted by state law and summary judgment should be entered invalidating this municipal resolution. This determination can and should be made without the need to take any evidence, such as to the safety or environmental effects of fracking. As a matter of law, Longmont has prohibited the customary oil and gas operation of hydraulic fracturing, while the state oil and gas regulatory agency, the Colorado Oil and Gas Conservation Commission, expressly permits an operator to conduct fracking operations in all parts of Colorado. A direct conflict exists between the law and regulations of Longmont and the law and regulations of the State of Colorado as to the ability to conduct hydraulic fracturing of oil and gas wells. In view of this direct and unquestionable operational conflict, the strong state policy in uniform regulation and in protecting the correlative rights of all Colorado owners to obtain their fair share of oil and gas reserves, and the inescapable conclusion that Longmont's ban also violates the state prohibition against taking of private property without just compensation, Longmont's ban must yield to and be deemed preempted by state law and regulation.

WHEREFORE, Defendant TOP Operating Company prays that summary judgment be entered, issuing a declaratory judgment that Longmont Resolution R-2012-67 is invalid and preempted by state law and an injunction enjoining the City from any further enforcement of this Resolution.

Dated this 21st day of March, 2014.

ZARLENGO & KIMMELL, LLC
/s/ Thomas J. Kimmell
Pursuant to CRCP 121, Section 1-26(9) a duly signed original of this document is on file at the offices of Zarlengo & Kimmell, PC.

_____
Thomas J. Kimmell, Reg. No. 9043

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2014, I served a true and correct of the foregoing **TOP OPERATING COMPANY'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM BRIEF** via ICCES, addressed to the following:

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